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IN THE
COURT OF APPEALS OF INDIANA

CASEY L. ATKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 92A03-0606-CR-247
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITLEY CIRCUIT COURT
The Honorable James R. Heuer, Judge
Cause No. 92C01-0204-FB-63

December 21, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Casey Atkins appeals the twenty-year sentence he received after pleading guilty to armed robbery as a class B felony.[1] We affirm.

Issues

Atkins raises one issue: whether the trial court considered and weighed improper aggravating circumstances in sentencing him, thereby violating his Sixth Amendment rights. The State responds that the court did not abuse its discretion in sentencing. Further, the State raises the following issue on cross-appeal: whether the trial court abused its discretion by granting Atkins' motion for permission to file a belated direct appeal. We address this last argument first, as it has potential jurisdictional ramifications. *See Hull v. State*, 839 N.E.2d 1250, 1253 n.1 (Ind. Ct. App. 2005), *trans. not sought*.

Facts and Procedural History

On April 26, 2002, the State charged Atkins with armed robbery as a class B felony, theft as a class D felony, and five counts of class A misdemeanor battery causing bodily

[1] *See* Ind. Code § 35-42-5-1 ("A person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant[.]"). At the relevant time, Indiana Code Section 35-50-2-5 provided that the presumptive term for a class B felony was "a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." That section has since been amended to provide: "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." 2005 Ind. Acts 71 § 8, eff. April 25, 2005.

injury. Appellant's App. at 8-11.[2] On August 26, 2002, the court held a change of plea hearing, and the parties filed a plea agreement. Tr. at 7-14. Pursuant to the agreement, Atkins would plead guilty to robbery as a class B felony, the State would dismiss the six other counts, and sentencing would be left to the trial court. App. at 33-35. That day, the court granted Atkins' motion to withdraw his former plea of not guilty, took the guilty plea under advisement, ordered a pre-sentence investigation report, and scheduled a sentencing hearing for September 23, 2002. *Id*. at 39; Tr. at 13.

After a continuance, the court held a sentencing hearing on October 16, 2002. Tr. at 15-20. Following examination of Atkins and argument by the defense and the prosecution, the court accepted the guilty plea and entered judgment of conviction. As per the plea agreement, the State dismissed the six other charges. App. at 43. On that same date, the court issued its sentencing memorandum, which summarized the mitigating circumstances this way: "1) defendant's difficult childhood; and 2) defendant's mental health history; and 3) defendant's letter of apology[.]" *Id*. at 41. The aggravating circumstances were listed as: "1) defendant's 4 prior misdemeanor convictions; and 2) defendant's previous felony conviction; and 3) defendant's violation of probation and parole; and 4) significant victim impact; and 5) the use of Mace or Pepper Spray on the victims while committing the offense; and 6) defendant's educational and employment record." *Id*. Atkins was not advised by the court of his right to a direct appeal of his sentence.

[2] On May 9, 2002, the State filed an amended information. Appellant's App. at 16-19. The parties do not mention why the information was amended or in what way it is different from the original information. We presume the amendment has no bearing on the issues appealed.

On February 26, 2003, Atkins filed, pro se, a petition for post-conviction relief, a notice of appeal, and an affidavit of indigency. *Id*. at 48-51. Within his filings, Atkins raised, *inter alia*, sentencing/plea issues and indicated his need for appointed counsel. The court forwarded his petition to the State Public Defender, and on April 2, 2003, the assigned deputy public defender filed an appearance and a notice of present inability to investigate. *Id*. at 66-72. The court stayed the proceedings until the deputy public defender was able to proceed. *Id*. at 73. On July 10, 2003, the deputy public defender filed a motion to withdraw the pro se notice of appeal without prejudice; said motion was granted a few days later. *Id.* at 79-81.

On June 24, 2004, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), which held that facts supporting an enhanced sentence must be admitted by the defendant or found by a jury. On September 30, 2004, the transcript in Atkins' case was "sent to public defender per verbal request." App. at 6. On November 9, 2004, our supreme court issued *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004), in which it held that the "proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under [Indiana Post-Conviction Rule 2, belated notice of appeal]." Our supreme court further instructed, "the post-conviction court should have dismissed the petition for post-conviction relief for lack of jurisdiction without prejudice to any right [the defendant] may have to file a belated notice of appeal in accordance with the requirements of P-C.R. 2." *Id.*

On March 9, 2005, our supreme court issued *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied*, in which it held that the "sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." *Smylie* quoted the United States Supreme Court as follows: "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id*. at 687 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

Meanwhile, in Atkins' case, on September 28, 2005, a new deputy public defender filed a notice of substitution of counsel. App. at 6. On November 16, 2005, Atkins' new deputy public defender filed a motion to dismiss the petition for post-conviction relief without prejudice to pursue proceedings under Post-Conviction Rule 2 and requested further assistance of counsel, all of which was granted on November 18, 2005. *Id*. at 82-85, 88. On November 29, 2005, local counsel Anthony Churchward appeared for Atkins and filed a motion for permission to file belated notice of appeal, which was granted that day. *Id.* at 92-95. On December 13, 2005, Atkins, by Churchward, filed his belated notice of appeal. *Id*. at 96.

Discussion and Decision

I. Cross-Appeal

In its cross-appeal, the State asserts that the trial court abused its discretion by granting Atkins' motion for permission to file a belated direct appeal. The State maintains that Atkins' motion "makes only bald assertions and provides no evidence that [Atkins] was

without fault for not timely filing his notice of appeal and it certainly does not provide any evidence showing how he had been diligent in pursuing a belated notice of appeal." Appellee's Br. at 7-8 (citing App. at 93). In short, the State contends that Atkins has failed to meet his burden to establish his entitlement to file a belated notice of appeal; thus, his notice of appeal was untimely.

Generally, the trial court has discretion in reviewing a petition for permission to file a belated notice of appeal, and its decision will not be disturbed unless an abuse of discretion is shown. *See Beaudry v. State*, 763 N.E.2d 487, 489-90 (Ind. Ct. App. 2002). However, when the trial court does not conduct a hearing before ruling on a petition to file a belated notice of appeal, and the allegations contained in the motion itself provide the only basis in support of a motion, we review the decision de novo. *See Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005).

Atkins did not file a reply brief or otherwise respond to the State's allegation on cross-appeal that the trial court erred in permitting him to file a belated notice of appeal. "In such a circumstance, if we find prima facie error, we may reverse." *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied*. "In this context, prima facie is defined as "at first sight, on first appearance, or on the face of it." *Id*. Therefore, if we determine that the grant of Atkins' petition was prima facie error, we lack jurisdiction and must dismiss his appeal. *See id*.

Having failed to file a timely notice of appeal within thirty days as required, Atkins forfeited his right to appeal "unless sought under P-C.R. 2." *See id*. (citing Ind. Appellate Rule 9(A)(5)). Indiana Post-Conviction Rule 2, which permits a defendant to seek

permission to file a belated notice of appeal, provides in part:

> Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:
>
> (a) the failure to file a timely notice of appeal was *not due to the fault of the defendant*; and
>
> (b) the defendant has been *diligent* in requesting permission to file a belated notice of appeal under this rule.
>
> The trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file a belated notice of appeal shall be conducted according to Section 5, Rule P.C. 1.
>
> If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.
>
> If the trial court finds no grounds for permitting the filing of a belated notice of appeal, the defendant may appeal such denial by filing a notice of appeal within thirty (30) days of said denial.

Ind. Post-Conviction Rule 2(1) (emphases added). The Rule's text requires neither a formal hearing nor explicit written findings.

A petitioner has the burden of proving by a preponderance of the evidence that he is entitled to the relief sought. *See Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), *trans. denied*. "Therefore, in a proper motion for a belated notice of appeal, he must demonstrate he was diligent in pursuing the appeal." *Townsend*, 843 N.E.2d at 974 (citing *Collins v. State*, 420 N.E.2d 880, 881 (Ind. 1981)). "Although there are no set standards defining delay and each case must be decided on its own facts, a defendant must be without fault in the delay of filing the notice of appeal." *Baysinger*, 835 N.E.2d at 224. Factors affecting this determination include the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether he was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay.

Id.

Atkins' November 29, 2005 petition to file belated notice of appeal contained four allegations:

> 1. That [Atkins] was convicted in this cause on August 26, 2002 following his plea of guilty.
> 2. [Atkins] is an "eligible person" pursuant to Rule 2 of the Indiana Rules of Procedure for Post-Conviction Remedies as he would have the right to challenge on direct appeal his sentence herein, but for his failure to timely file a Notice of Appeal in this cause following his plea of guilty.
> 3. [Atkins'] failure to file a timely Notice of Appeal was not due to the fault of [Atkins].
> 4. [Atkins] has been diligent in requesting permission to file a belated notice of appeal under Rule 2 of the Indiana Rules of Procedure for Post-Conviction Remedies.

App. at 93-94. No hearing was requested or held regarding the petition. The court's order, "Approving Defendant's Petition for Authority to File Belated Notice of Appeal," issued on the same day that Atkins filed his petition, simply stated:

> The Court, having examined and reviewed [Atkins'] Petition to File Belated Notice of Appeal and being duly advised in the premises, now grants said Petition.
> IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that [Atkins] shall have authority of the Court to file a belated Notice of Appeal in the above-captioned cause pursuant to Rule PC2 of the Indiana Rules of Procedure for Post-Conviction Remedies.

Id. at 95.

Having scoured the appendix and transcripts, we find no indication that Atkins was informed of or was otherwise aware of his direct appeal rights when he pled guilty in the fall of 2002. Moreover, there is no evidence or allegations that Atkins committed an act or omission that contributed to the delay in appeal. To the contrary, just four months after the court issued its sentencing order, Atkins attempted to challenge his sentence via filing, pro se,

a petition for post-conviction relief and a notice of appeal. Atkins' deputy public defender actually withdrew the notice of appeal. Thereafter, the following sequence of events occurred: (1) the United States Supreme Court issued *Blakely*; (2) Atkins' counsel requested his case transcript; (3) the Indiana Supreme Court issued *Collins* and then *Smylie*; (4) a substitute deputy public defender moved to dismiss Atkins' petition for post-conviction relief; and (5) eleven days after the court granted the motion, local defense counsel moved for permission to file a belated notice of appeal. The delay that exists in this case is attributable to the "prior uncertainty in the law rather than [to Atkins'] lack of diligence." *See Kling v. State*, 837 N.E.2d 502, 505, 509 (Ind. 2005) ("Prior to *Collins*, there was a split in authority over whether the proper procedure to challenge a sentence imposed upon an 'open plea' was by means of a direct appeal or by means of collateral review under P-C.R. 1.").

In summary, our independent review of the facts and circumstances presented here leads to the conclusion that Atkins was diligent and not at fault. Thus, the trial court did not abuse its discretion by granting Atkins permission to file a belated notice of appeal.[3]

II. Atkins' Blakely *Issue*

In ordering Atkins to serve the twenty-year sentence, the court explained its decision as follows:

> This is the fourth bank robbery case in the past several years that I've been involved in. Being the Judge handling these cases, all involving multiple

[3] It is interesting to consider that if the lower court had not granted Atkins permission to pursue a belated appeal, Atkins would have been prohibited from bringing any appeal of his sentence. *See Collins*, 817 N.E.2d at 233 (citing P-C.R. 2). Under these facts, prohibiting Atkins' pursuit of a belated appeal would appear inconsistent with Indiana Constitution Article 7, Section 6's provision of "an absolute right to one appeal." However, Atkins did not raise this inconsistency.

> defendants and in each situation, I always, it always strikes me, the significance of the impact the victims go through and how this affects their lives, whether it be for a week, a month, and in many cases, for the rest of their lives. I know in other cases, we've had bank tellers who had worked for years, making banking their careers, and couldn't go back to work, and others who had to take off extended periods of time, trying to deal with the fear of having this happen. Again, I don't think you understand what it is for these people to go about their work and have somebody stick a gun in their face. One of the victims in this case, did say that you shoved the gun at the tellers. It doesn't say, precisely, whether it was in somebody's face or not, but *certainly the presence of the gun was something that affected at least the individual that made this statement in the Pre-Sentence Investigation Report*. But I'm not here to talk about other cases, we're here to talk about this case. In your past you already put one victim in fear by committing a felony in the state of Michigan, Assault With Intent to Rob While Armed, whether it's a b.b. gun or whatever, the person facing down the barrel of the gun doesn't know what kind of gun it is. This is a very serious matter. I will list the aggravators to be as follows. The first aggravator to be the defendant's four misdemeanor convictions. The second aggravator to be the conviction for Assault With Intent to Rob While Armed, a felony in the state of Michigan. I'll find that the third aggravator to be the defendant has violated the conditions of probation and also violated the conditions of parole in the past. A *fourth aggravator would be the significant victim impact as set forth in the Pre-Sentence Investigation Report. A fifth aggravator would be the use of mace or pepper spray on the victims while the armed robbery was in progress and I'll find a sixth aggravator to be the defendant's educational and employment record.* I'll find the mitigators to be that, the defendant had a very difficult childhood. Find a second mitigator to be his mental health history and find a third mitigator that he has written a letter of apology to the bank tellers. I'll find that the aggravators outweigh the mitigators in this case. I'll sentence you to ten years together with ten years for aggravating circumstances, for a total of twenty years to the Indiana Department of Corrections and order that sentence be served in its entirety. I'll give you credit for one hundred seventy-three days served to date towards that sentence, enter judgment for the restitution of $6,949.00 and enter judgment for the costs of this action. I'll remand you to the custody of the Sheriff at this time to serve that sentence. Alright, that's all.

Tr. at 19-20 (emphases added).

Atkins first notes the relevant, oft-stated sentencing standards for lower courts and reviewing courts -- abuse of discretion and inappropriateness, respectively. *See* Appellant's

Br. at 12 (citing *Leffingwell v. State*, 793 N.E.2d 307, 309 (Ind. Ct. App. 2003), and Ind. Appellate Rule 7(B)). He then argues that three of the aggravators utilized in his case were improper under *Blakely* and *Smylie* because they were not "found by a jury, beyond a reasonable doubt, prior to their use by the trial court to enhance his sentence above the presumptive term." *Id*. at 14-15. He requests a remand for re-sentencing or correction of his sentence. *Id*. at 16. The State maintains that *Blakely* does not apply retroactively to belated appeals, but that even if it does, Atkins' sentence was proper.

Recently, we extensively analyzed the retroactivity issue in another belated appeal case and "conclude[ed] that *Blakely* applies retroactively because [the defendant's] case was not yet final when *Blakely* was decided." *Gutermuth v. State*, 848 N.E.2d 716, 726, (Ind. Ct. App. 2006), *trans. granted*. Since then, our supreme court granted transfer in *Gutermuth* and scheduled oral argument in that case for November 8, 2006.[4] However, on October 19, 2006, our supreme court stayed further proceedings in *Gutermuth*, vacated its oral argument, and ordered the parties to notify it "when the United States Supreme Court has issued an opinion in *Burton v. Waddington* [05-9222]." *Burton* presents the following two questions:

> 1) Is the holding in *Blakely* a new rule or is it dictated by *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)]?
>
> 2) If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

See http://supreme.lp.findlaw.com/supreme_court/docket/2006/november/05-92222-burton-v-waddington.html. While the United States Supreme Court did hear oral argument in

[4] *See also Boyle v. State*, 851 N.E.2d 996 (Ind. Ct. App. 2006), *trans. granted*.

Burton on November 7, 2006, it has not yet issued an opinion. Unless and until the U.S. Supreme Court revises or clarifies its rules on retroactivity, we will err on the side of applying *Blakely*'s principles where, as here, the availability of appeal via Post-Conviction Rule 2(1) had not yet been exhausted when *Blakely* was issued.

Accordingly, we now address the heart of Atkins' claim, that is, whether the court used aggravating circumstances that violated *Blakely*. Atkins concedes that a jury was not required to find his misdemeanor convictions, felony conviction, and violations of probation and parole, beyond a reasonable doubt, "as they all related to his prior criminal record." Appellant's Br. at 14 (citing *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005)); *see also Dillard v. State*, 827 N.E.2d 570, 575 (Ind. Ct. App. 2005) ("By its own terms, and as consistently recognized by our cases analyzing *Blakely*, an enhancement based upon criminal history does not trigger a *Blakely* analysis."), *trans. denied*. Atkins challenges the remaining three aggravators: the fact that mace or pepper spray was used, the significant victim impact, and his educational and employment record. *See* Appellant's Br. at 14.

In agreeing to the factual basis, Atkins specifically admitted that a pepper spray agent was used by one of his accomplices during the robbery. Tr. at 13. Aggravating circumstances admitted by a defendant are proper under *Blakely*. *Marshall v. State*, 832 N.E.2d 615, 622 (Ind. Ct. App. 2005), *trans. denied*; *see also McGinity v. State*, 824 N.E.2d 784, 788-89 (Ind. Ct. App. 2005) (finding no *Blakely* violation where defendant "stipulated to the admission of and admitted to the facts as stated in the Probable Cause Affidavit as the factual basis for his guilty plea" because under *Blakely* "if a defendant admits to facts underlying an aggravator, the jury does not have to determine beyond a reasonable doubt

whether that aggravator exists"), *trans. denied*. Therefore, the use of pepper spray was properly considered as an aggravator.

As for the significant victim impact, it was apparently discussed in the pre-sentence investigation report. *See* Tr. at 15-20.[5] "This court has held that if a defendant *confirms the accuracy* of a presentence report when given an opportunity to contest it, such confirmation amounts to an admission of information contained in the report for *Blakely* purposes." *Sullivan v. State*, 836 N.E.2d 1031, 1036 (Ind. Ct. App. 2005) (citing *Carmona v. State*, 827 N.E.2d 588, 596-97 (Ind. Ct. App. 2005) (emphasis added)); *cf. Ryle v. State*, 842 N.E.2d 320, 323 n.5 (Ind. 2005) (noting that "using a defendant's *failure to object* to a presentence report to establish an admission to the accuracy of the report implicates the defendant's Fifth Amendment right against self-incrimination.") (emphasis added). Unlike in *Ryle* where the defendant simply failed to object to a report, Atkins and his counsel reviewed and affirmatively proclaimed his pre-sentence investigation report to be "accurate as submitted[.]" Tr. at 16. As such, we are comfortable treating that positive affirmation as an admission of the significant victim impact.[6] Accordingly, *Blakely* was not implicated, let alone violated, by the court's consideration of this admitted information as an aggravating

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[5] Our review of this issue is "limited by the fact that [Atkins] failed to include his presentence investigation report in his Appendix." *See Guillen v. State*, 829 N.E.2d 142, 149 (Ind. Ct. App. 2005), *trans. denied*. Indeed, even after the State in its appellee's brief flagged the omission of the report, Atkins did not move to supplement the appendix. *See* Appellee's Br. at 6 n.2. We presume that if the report had been supportive of Atkins' argument in this regard, he would have requested permission to include it.

[6] *Cf. Thomas v. State*, 840 N.E.2d 893, 903 (Ind. Ct. App. 2006) ("Thomas' *failure to challenge* the fact that he was married to D.N.'s mother does not constitute an admission that he was in a position of trust. Therefore, because the jury did not find and Thomas did not admit that he was in a position of trust, the trial court's reliance upon this fact to enhance Thomas' sentences violated Thomas' Sixth Amendment right to trial by jury.") (emphasis added), *trans. denied*.

circumstance.

This brings us to the sixth and last aggravating circumstance: Atkins' educational and employment record. We know nothing about this aggravator other than that it was mentioned in the sentencing memorandum and at the sentencing hearing. Assuming that its use did violate *Blakely*, we examine whether reversal is warranted. We have explained:

> Even one valid aggravating circumstance is sufficient to support an enhancement of a sentence. When the sentencing court improperly applies an aggravating circumstance but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. This occurs when the invalid aggravator played a relatively unimportant role in the trial court's decision. When a reviewing court "can identify sufficient aggravating circumstances to persuade it that the trial court would have entered the same sentence even absent the impermissible factor, it should affirm the trial court's decision." When a reviewing court "cannot say with confidence that the impermissible aggravators would have led to the same result, it should remand for re-sentencing by the trial court or correct the sentencing on appeal."

Means v. State, 807 N.E.2d 776, 788 (Ind. Ct. App. 2004) (citations omitted), *trans. denied*; *see also Bonds v. State*, 729 N.E.2d 1002, 1005 (Ind. 2000) (noting that one aggravating circumstance, alone, is sufficient to justify an enhanced sentence); *Merlington v. State*, 814 N.E.2d 269, 273 (Ind. 2004) ("If one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed.").

Here, we can easily identify sufficient aggravating circumstances to persuade us that the trial court would have entered the same sentence even absent the assumed impermissible "educational and employment record" factor. We are confident that given twenty-four-year-old Atkins' substantial criminal history, including one felony for assault with intent to rob, four misdemeanors, and violations of probation and parole, as well as the significant victim

impact and the use of mace, the same sentence would have been ordered.[7]

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.

[7] Applying a harmless error approach, as has been done in some *Blakely* cases, affirmance is even more certain. *See, e.g.*, *Rembert v. State*, 832 N.E.2d 1130, 1133 (Ind. Ct. App. 2005).